Supreme Court, U.S.
FILED

10-753 DEC 2-2010

No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

Antonio M. Apodaca

Petitioner,

v.

Merit Systems Protection Board

Respondent.

On Petition For Writ of Certiorari
To The UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

Is it permissible for a federal agency to breach a tenured federal employee's constitutionally protected "vested interest in his employment" and his right to exercise "Free Will" without affording the employee his Fifth Amendment Right to "Due Process"?

Is a credibility determination necessary when the issue in question involves an individual's exercise of "Free Will"?

Is the barring of a tenured federal employee from his workplace an Adverse Action?

Parties to Proceedings

The Caption shown accurately identifies who the petitioner(s) and who the respondent(s) are in this Court.

Corporate Disclosure Statement

A corporate disclosure statement is not applicable because the Petitioner is an individual and not a corporate entity.

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JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was issued on June 10, 2010, and the Petitioner's petition for rehearing and for rehearing en banc was denied on September 03, 2010. This Court has jurisdiction over this petition under 28 U.S.C. § 2101(c).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part, that "No Person shall .....be deprived of life, liberty or property without due process of law".

5 U.S.C. § 7513(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

5 U.S.C. § 7513(b)(1),(2), & (4) provides, in pertinent part, An employee against whom an action is proposed is entitled to (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; ... and (4) a written decision and the specific reasons therefore at the earliest practicable date.

STATEMENT OF THE CASE

The Petitioner in this case was a tenured federal employee who had approximately 42-plus years of continuous federal civil service.

Petitioner was employed by the U. S. Department of Homeland Security ("DHS") as a Deputy Comptroller for the U. S. Coast Guard's ("USCG"), Integrated Support Command ("ISC") Miami, Miami, Florida. On November 2008, Petitioner's supervisor and the Comptroller for the ISC, Commander (CDR) Anthony Alarid, ordered Petitioner to exchange his office with that of the Chief, Budget and Accounting. This exchange would relocate the Petitioner a distance of approximately 25 linear feet and place the Petitioner at a location adjacent to Alarid's office. His supervisor set a deadline of December 1, 2008 for Petitioner to complete the exchange of offices.

On November 20, 2008, approximately an hour before Petitioner was scheduled to end his workday CDR Alarid confiscated the Petitioner's workplace access and security badge and office key without Alarid giving the Petitioner any reason for his actions and without allowing Petitioner to challenge Alarid's actions. Based on Alarid's actions, Petitioner reasonably concluded he had been constructively terminated and accordingly, on November 29, 2008 prepared and submitted a Standard Form (SF) 52 to the USCG personnel office, Washington, D.C. requesting retirement effective December 1, 2008. Petitioner wrote on his SF-52 that his reason for requesting retirement was "Retirement requested due to the imposition of constructive discharge conditions by management." Simultaneously, Petitioner submitted a claim to the Merit Systems Protection Board alleging he had been constructively terminated, among other things.

On March 9, 2009, the assigned administrative judge held a jurisdictional hearing in Miami, Florida, at which both Alarid and the Petitioner appearing Pro Se testified as to the circumstances surrounding the Petitioner's claim. The administrative judge found that Apodaca had retired voluntarily and dismissed the appeal for lack of jurisdiction. The Board denied the Petitioner's petition for review of the initial decision on July 24, 2009, and the administrative judge's decision became the final decision of the Board. The Petitioner timely appealed the Board's final decision to the United States Court of Appeals for the Federal Circuit ("CoA").

The Petitioner had a compelling belief that the administrative judge and the MSPB had not applied the appropriate legal standard. The Petitioner's belief was based on the fact that these two administrative forums never considered the Petitioner's arguments. The Petitioner has consistently argued that the (1) Petitioner was not afforded his constitutionally protected right to Due Process pursuant to 5 U.S.C. § 7513(b)(1) and "Free Will" when his building access and security clearance badge were confiscated nor when the Agency received the Petitioner's SF-52 citing "Retirement requested due to the imposition of constructive discharge conditions by management" as the Petitioner's reason for requesting retirement, (2) the Agency's failure to follow its own agency regulations pertaining to the "Agency's Check In and Check Out Procedures " ISCMIAMIINST 5000.2 and "the Seventh District's Security Identification Badge Policy" CGD SEVENINST 5512.2c, (3) the agency's violation of the Prohibited Personnel Practices and Merit System Principles, 5 U.S.C. § 2302(b)(12) and 5 U.S.C. § 2301(b)(6) respectively; (4) the agency's violation of Section 6384 and 6385 of the Family Medical Leave Act (FMLA); (5) the agency's violation of the Privacy Act, when on November 20-22, 2008, CDR Alarid falsely

informed his staff that the Petitioner had retired (RB, pg-3-4); (6) the Time Pressure exerted on the Petitioner to involuntary retire (immediate termination); (7) the agency's inconsideration of the Petitioner's traumatic event (daughter's Breast Cancer condition); and (8) compelling the Petitioner's mitigation of damages to preclude an actual money loss of approximately $2,412.96 in salary. In his appeal to the Court of Appeals the Petitioner basically argued these same issues he had argued before the administrative judge and the MSPB.

The Court of Appeals affirmed the Board's decision basically on the same terms as the administrative judge and the MSPB, although to some extent the CoA paraphrases or interprets the facts erroneously. The CoA also transposes and consolidates the facts without due consideration of their affect as to timing. The following are examples cited in the CoA decision:

On page 2 Background Section the CoA writes:

1. "Apodaca refused to change offices, informing Alarid that he would rather retire than change his office." This statement is erroneous in that the Petitioner never refused to exchange offices. The Petitioner simply stated, "He would have to contemplate retirement in order to avoid a repeat of the hostility previously suffered. However, the Appellant advised CDR Alarid that his decision to retire could not be determined because it was contingent on Appellant's family psychological and financial conditions relative to the Appellant's daughter Breast Cancer Condition and its personal ramifications". (Petitioner's MSPB Complaint)

2. "Apodaca then told Alarid that he would retire effective January 3, 2009. However, following further

discussions between the two, Apodaca told Alarid that he would retire on November 30, and that November 20 would be his last day at work as he intended to take leave thereafter." Petitioner avers that all the dates mentioned were all set forth by CDR Alarid during separate conversations with the Petitioner. CDR Alarid established these dates simply because the Petitioner passively acquiesced. When CDR Alarid proposed these dates the Petitioner did not argue with nor was he disrespectful towards Alarid because he was concerned that Alarid would accuse him of being insubordinate. At all times, it was Alarid that cajole and pressured the Petitioner by proposing different retirement dates and accusing the Petitioner of being unreasonable. It was Alarid who became frustrated and told the Petitioner, "Hell, you better retire on November 30, 2008". (See Alarid's Affidavit)

In its Decision the CoA conflates and transposes the facts in similar fashion as done by the administrative judge and the MSPB. The CoA simply noted that the issue had been correctly decided by the MSPB in this case, reached the same conclusion. Most, if not all, of the facts considerate by these tribunals are not relative to the Petitioner's Constructive Discharge Claim. The CoA in similar fashion does not address the facts relevant to the Petitioner's Constructive Discharge Claim, e.g., Agency's failure to provide Petitioner due process, "free will"; follow its regulations, violation of the Prohibited Personnel Practices and Merit System Principles, violation of Section 6384 and 6385 of the Family Medical Leave Act (FMLA); the agency's violation of the Privacy Act, inter alia. {Supra}

In its Decision, the CoA outlines various facts, most which are not relevant to the Petitioner's Claim, others that are either incompletely stated, mentioned but not

discussed, taken out of context, framed to support the Government's case while others erroneously conclude the Petitioner acted improperly. In one instance the CoA mentions "We are not persuaded by Apodaca's logic."

The Petitioner avers that his logic is simple and reasonable, based on the following facts: If in actuality, the Petitioner had until December 1, 2008 to exchange offices as ordered by his supervisor, but on November 20, 2008, his supervisor preemptively confiscates his workplace access and security badge and keys which effectively barred him from his workplace, the Petitioner is effectively prohibited from meeting the December 1, 2008 deadline. Furthermore, the Petitioner being a family man with responsibility for his family economic conditions reasonably determined, he had been "constructively terminated" because the confiscation of his badge and key was an adverse employment action which infringe on the Petitioner's constitutionally protected vested right in his employment for which he was not afforded "due process" and "Free Will" pursuant to the Fifth Amendment and 5 U.S.C. § 7513(a) & (b) (1), (2), & (4). This logic is supported by the relevant facts.

The facts in this case vividly confirm that CDR Alarid's confiscation of the Petitioner's badge and keys breached the Petitioner's constitutionally protected vested right in his employment without affording the Petitioner due process and free will. This is similar to when the Government is the first to breach a contractual right.

The Petitioner at all times acted properly, both administratively and legally. It is universally and empirically recognized that all "employees" will contemplate "retiring" at some point in their lifetime. The Petitioner assertion that he would contemplate retirement was not a crime nor was it an action of such

gravity that would compel the Government to breach the Petitioner's constitutionally protected vested right in his employment. *In Loudermill, the Supreme Court held that a proper balancing of the interests as set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), requires that, as a general rule, there be some form of pretermination hearing for an employee who has established that he has a property interest in the retention of his position. In short, the Court reasoned that the general governmental interest in immediate termination of the employee does not outweigh the interests of the employee in retaining his employment and in having an opportunity to present his side of the case. "Even when the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." Loudermill, 470 U.S. at 543. In Arnett v. Kennedy, 416 U.S. 134 (1974), this Court stated, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U.S., at 142 - 146.*

REASONS FOR GRANTING THE WRIT

As this Court has made increasingly clear, the Fifth and Fourteenth Amendment of the Constitution require the Government afford a tenured federal employee "Due Process" when taking an adverse personnel against an employee when the employee has a constitutionally protected vested right in his employment and has a right to "free will". See following citations:

Board of Regents v. Roth, 408 U.S. 564 (1972), holds, inter alia:(For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."; citing Wisconsin v. Constantineau, 400 U. S. 433, 400 U. S. 437. Wieman v. Updegraff, 344 U. S. 183, 344 U. S. 191; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123; United States v. Lovett, 328 U. S. 303, 328 U. S. 316-317; Peters v. Hobby, 349 U. S. 331, 349 U. S. 352 (DOUGLAS, J., concurring). See Cafeteria Workers v. McElroy, 367 U. S. 886, 367 U. S. 898. In such a case, due process would accord an opportunity to refute the charge before University officials.)

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 546 (1985), Hesse V. Department of State 217 F.3d 1372, 1376 (Fed. Cir. 2000); 47 M.S.P.R. at 684 holds that at a minimum, "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the evidence and an opportunity to present (the employee's) side of the story". 47 M.S.P.R. at 681. 47 M.S.P.R. at 680 citing the application of the Cleveland Board of Education v. Loudermill 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L. Ed. 2d 494 (1985). AJ violated her due process right by being predisposed against her, hampering her presentation of the case and abusing his discretion

One of the main issues in this case that may require review by this Court is the failure of Agency's and the lower Tribunals to recognize that what the Petitioner stated and has argued is a constitutionally protected issue. *Waters, et. al. v. Churchill, et. al. 114 S. Ct. 1878;128 L. Ed. 2d 686, (May 1994) We think employer decision-making will not be unduly burdened by having courts look to the facts as the employer reasonably found*

*them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available -- if, for [*32] instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay.*

[5A]If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision -- discharge, suspension, reprimand, or whatever else -- of the sort involved in the particular case. JUSTICE SCALIA correctly points out that such care is normally not constitutionally required unless the employee has a protected property interest in her job, post, at 688; see also ***Board of Regents of State Colleges*** *v. **Roth, 408 U.S. 564, 576-578, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)**; but we believe that the possibility of inadvertently punishing someone for exercising her* ***First Amendment*** *rights makes such care necessary.*

Another reason which may warrant the Court's review is the practice of an Agency using ambush, concealment, and surprise. This practice must not to be tolerated by the judicial system. In this case, the Supervisor and the Agency's Human Resource Officer knew at least two-days in advance of their planned action to confiscate the Petitioner's workplace and security badge and keys yet they failed to provide "due process" to the Petitioner. Additionally, over 30-days had elapsed

since the Supervisor had set forth his proposal on which they relied for taking the Petitioner's badge and key.

The legal review of this type of case (by its nature) is limited by statue to the Merit System Protection Board and the U. S. Court of Appeals for the Federal Circuit. This limit review forum may create the potential for other similar cases to be decided in similar fashion as the case at bar which may result in improper or unfair review of similar cases. This may cause other Petitioners to forgo filing claims with these limited forums or if similar cases are filed with these limited forums may result in Petitioners incurring legal costs needlessly.

The Agency, the MSPB and CoA relied on subjective evidence to reach their conclusions in this case. The Agency's action was based solely on the Petitioner's Supervisor being convinced the Petitioner would retire even though the Petitioner had no submitted any required written request or the usual SF-52 "Request for Personnel Action" requesting retirement as of the date his badge and key was confiscated. This raises the question of whether an Agency's "subjective testimony" meets the "substantial evidence" and "totally of the circumstances" standards in a manner sufficient to supersede the constitutional protection of "due process" provided a Petitioner by the Fifth and Fourteenth Amendments of the Constitution to a tenured federal employee with a constitutionally protected vested right in his employment.

The Decisions of the CoA appear to be an anomaly in that its Decisions in this case does not comport with their or other precedents. See following citations:

Handy v. U. S. Postal Service, 754 F.2d 335 (Fed. Cir. 1985). "The board found support for its position that procedural error (statutory or not) must be shown to be

harmful in precedent of this court, particularly, Doyle v. Veterans Administration, 229 Ct.Cl. 261, 667 F.2d 70, 72 (1981),Brewer v. U.S. Postal Service, 227 Ct.Cl. 276, 647 F.2d 1093, 1097 (1981), cert. denied, 454 U.S. 1144, 102 S.Ct. 1005, 71 L.Ed.2d 296 (1983) and Shaw v. U.S.Postal Service, 697 F.2d 1078 (Fed.Cir.1983).

Cosby v. United States 417 F.2d 1345, 1355, Ct. Cl. (1969) in a concurring opinion by Judge Nichols which was adopted by the Court states in Dictum (in part):

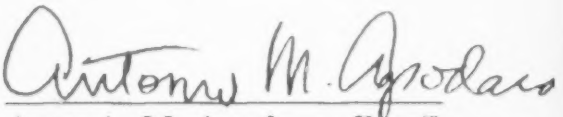
"If an employee's continued presence in an agency is regarded as undesirable, and if he tenders any piece of paper purporting to be a resignation, the temptation is to snatch at it, thus avoiding the complex ritual and uncertain outcome of an adverse action. It is, I believe, the duty of the personnel officer nevertheless to scrutinize the paper with care, and to reject it as a resignation if it states, clearly or ambiguously, that the resignation is coerced. That was not done here and this lawsuit followed, which in my judgment defendant was lucky to win. A coerced resignation is not a resignation at all. It is an adverse action which is legally invalid for failure to follow the procedures laid down in statutes and regulations. McGucken v. United States, 407 F.2d 1349, 187 Ct.Cl. 284, cert. filed, 396 U.S. 894, 90 S.Ct. 190, 24 L.Ed.2d 170 (June 11, 1969)."

"Therefore, nothing decided in this case, as I read it, should be regarded as condoning any relaxation of the vigilance required of the Civil Service Commission and of personnel officers generally, against the acceptance of coerced resignations, whether actually coerced, or so stated in the course of the employee's filling out the applicable form."

CONCLUSION

For the forgoing reasons, petitioners submit that this Court should grant review in this case to reverse the holding of the U. S. Court of Appeals for the Federal Circuit with respect to Board's finding that Apodaca's retirement was voluntary is supported by substantial evidence and that it has considered Apodaca's remaining argument and finding them unpersuasive. Petitioner would also ask this Court to remand the case to the Court of Appeals for it to apply appropriate scrutiny under the Fifth Amendment and this Court precedent.

Respectfully submitted,



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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ANTONIO M. APODACA
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

2009-3293

Petition for review of the Merit Systems Protection Board in AT0752090223-I-1.

Decided: June 10, 2010

ANTONIO M. APODACA, of Miami, Florida, pro se.

JEFFREY A. GAUGER, Attorney, Office of the General Counsel, Merit Systems Protection Board, of Washington, DC, for respondent. With him on the brief were JAMES M. EISENMANN, General Counsel, and KEISHA DAWN BELL, Deputy General Counsel.

Before LOURIE, FRIEDMAN and MOORE, *Circuit Judges*.

PER CURIAM.

Antonio Apodaca appeals from the final decision of the Merit Systems Protection Board (the "Board") dismissing his appeal for lack of jurisdiction. *Apodaca v. Dep't of Homeland Sec.*, No. AT-0752-09-0223-I-1 (M.S.P.B. July 24, 2009) ("*Final Order*"). Because the Board's decision that Apodaca retired voluntarily is supported by substantial evidence, we *affirm*.

BACKGROUND

Apodaca was employed by the Department of Homeland Security as a Deputy Comptroller for the Coast Guard's Integrated Support Command ("ISC") in Miami, Florida. In November 2008, Apodaca's supervisor and the Comptroller for ISC, Anthony Alarid, ordered Apodaca to move his office from its current location to a location adjacent to Alarid's office. Alarid set a deadline of December 1, 2008 for Apodaca to change his office. Apodaca refused to change offices, informing Alarid that he would rather retire than change his office. Apodaca then told Alarid that he would retire effective January 3, 2009. However, following further discussions between the two, Apodaca told Alarid that he would retire on November 30, and that November 20 would be his last day at work as he intended to take leave thereafter. Alarid informed his Command Staff Advisor ("CSA") of Apodaca's intentions by e-mail.

On November 20, 2008, Apodaca cleaned his office, shredded his personal writing pads, and disposed of files stored in his office. That afternoon, Alarid collected Apodaca's government identification badge and office keys

from him. On December 1, 2008, Apodaca submitted his retirement request form SF-52 to ISC, denoting an effective retirement date of November 30, 2008. On the SF-52, Apodaca stated the reason for his retirement as the "imposition of constructive discharge conditions by the management."

On December 30, 2008, Apodaca filed an appeal to the Merit Systems Protection Board, claiming that his retirement was involuntary. On March 9, 2009, the assigned administrative judge held a jurisdictional hearing in Miami, Florida, at which both Alarid and Apodaca testified as to the circumstances surrounding Apodaca's retirement. The administrative judge found that Apodaca had retired voluntarily and dismissed the appeal for lack of jurisdiction. The Board denied Apodaca's petition for review of the initial decision on July 24, 2009, and the administrative judge's decision became the final decision of the Board. Apodaca timely appealed the Board's final decision to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

The scope of our review in an appeal from the Board's decision is limited. We can only set aside the Board's decision if it was "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2000); *see Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1311 (Fed. Cir. 2003). We review the Board's jurisdiction without deference. *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998). However, "we are bound by the AJ's factual determinations unless those findings are not

supported by substantial evidence." *Id.* Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320, 1325 (Fed. Cir. 2005) (quotation marks omitted).

Apodaca challenges the Board's decision that he failed to prove by a preponderance of the evidence his allegations of coercion and duress by the agency so as to allow the Board to exercise jurisdiction over his appeal. He argues that his statements declaring his intentions to retire were mere contemplations of retirement. He argues that his responses to Alarid's order to move his office were unrelated to the events that occurred on November 20, 2008, leading up to his retirement. He contends that on that day he was performing routine cleaning of his office and preparing to take leave when Alarid confiscated his badge and keys, thereby constructively discharging him. He further contends that he did not return to work at any time after that date because of the "malicious and unprofessional manner" in which he had been treated. He contends that the reason for submitting an SF-52 on December 2, with an effective date of November 30, was that he wanted to "mitigate his damages." Moreover, he argues, the agency failed to follow checkout procedures required to terminate an employee. According to Apodaca, his retirement was forced upon him by the actions of his supervisor and was not voluntary. Therefore, he argues, the administrative judge and the Board erred in dismissing his claim for lack of jurisdiction.

The Board responds that there is no evidence that the agency imposed the terms of Apodaca's retirement. It argues that Apodaca was in control of his retirement decision at all times, repeatedly rejecting his supervisor's preferences in the matter and deciding himself both his

retirement date as well his last day at the office. The Board argues that contrary to Apodaca's assertions, Alarid pleaded with him not to retire or to at least stay till January 2009 in order to allow the process of hiring a replacement to be commenced. However, the Board points out, Apodaca refused to assist his supervisor in any way or change his retirement date. The Board notes that on November 20, Apodaca cleaned out his office. The Board contends that Alarid asked him for his badge and keys per the CSA's guidance and because he understood from Apodaca's prior statements that Apodaca was not returning to the facility after that date. The Board further points out that Apodaca submitted his retirement request voluntarily, at a time of his own choosing, and with an effective date that he had previously mentioned to his supervisor. The Board also notes that Apodaca never attempted to return to work. Under these facts, the Board argues, Apodaca cannot show that his retirement was a product of coercion by the agency or was otherwise involuntary. The Board urges us to affirm its dismissal of Apodaca's claim for lack of jurisdiction.

We conclude that the Board permissibly dismissed Apodaca's appeal for lack of jurisdiction. A decision to resign or retire is presumed to be voluntary. *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1123 (Fed. Cir. 1996). In order to overcome the presumption of voluntariness, a petitioner must make a non-frivolous allegation that the resignation or retirement was the product of misinformation, deception, or coercion by the agency. *Schultz v. Dep't of the Navy*, 810 F.2d 1133, 1135 (Fed. Cir. 1987). To establish involuntariness on the basis of coercion or duress, a petitioner must show that (1) the agency effectively dictated the terms of his retirement, (2) he had no realistic alternative but to retire, and (3) his retirement was the result of improper actions by the agency. *Garcia*

v. Dep't of Homeland Sec., 437 F.3d 1322, 1329 (Fed. Cir. 2006) (*en banc*). The test is an objective rather than subjective one; an employee's subjective feelings are irrelevant. *Middleton v. Dep't of Defense*, 185 F.3d 1374, 1379 (Fed. Cir. 1999).

On appeal, Apodaca primarily argues that, in finding the agency's actions justified, the administrative judge improperly relied on his statements to his supervisor leading up to November 20, 2008. He argues that his statements of his intention to retire were mere contemplations, pertaining to what he terms the "Exchange Office Situation" and were irrelevant to his "Constructive Discharge Claim." We are not persuaded by Apodaca's logic. Apodaca's actions and words clearly demonstrated that he did intend to retire and that his last day at the facility was November 20, 2008. His supervisor relied on his statements. The administrative judge was entitled to find Alarid's testimony credible. The e-mails exchanged between Alarid and his CSA support the administrative judge's finding, which was based on substantial evidence. The judge noted that Alarid's testimony was also consistent with other facts such as Apodaca cleaning his office, packing his personal items and circling dates on his calendar. Under such belief, it was proper for Alarid to ask Apodaca to submit an SF-52. As a departing employee's supervisor, Alarid was also required collect Apodaca's badge and keys. We agree with the Board that Alarid's actions were reasonable under the circumstances.

The administrative judge also reasoned that had Apodaca believed that he had been involuntarily discharged, he could have easily refused to submit an SF-52. Apodaca's argument that he submitted his retirement request and did not return to work because of the hostile manner in which he had been treated is not sufficient to satisfy

the demanding legal standard of proving that the agency coerced him to absent himself from work. *See Garcia*, 437 F.3d at 1329 ("[T]he doctrine of coercive involuntariness is a narrow one[,] requiring that the employee satisfy a demanding legal standard." (quotation marks omitted)). We find nothing in the evidence presented below to demonstrate that Apodaca was coerced into retirement. On the contrary, we agree with the Board that Apodaca was at all times in control of his retirement decision. The administrative judge found that the petitioner refused to accept any of his supervisor's suggestions with regard to his retirement and dictated the schedule of his departure. We agree with the administrative judge's findings and conclude that none of Apodaca's allegations are such that, if proven, would establish that a reasonable employee confronted with the same circumstances would feel coerced into retiring. *See Middleton*, 185 F.3d at 1379.

The Board's finding that Apodaca's retirement was voluntary is supported by substantial evidence. We have considered Apodaca's remaining arguments and find them unpersuasive. Accordingly, we *affirm* the Board's decision that it lacked jurisdiction over Apodaca's appeal.

AFFIRMED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

2009-3293

ANTONIO M. APODACA

Petitioner,

v.

MERIT SYSTEM PROTECTION BOARD

Respondent.

Petition for review of the Merit Systems Protection Board in AT0752090223-I-1

ORDER

Note: This order is nonprecedential

United State Court Of Appeals For The Federal Circuit

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 10, 2010.

FOR THE COURT

"s/"
Jan Horbaly
Clerk

Dated: 09/03/2010

Filed
U.S. Court of Appeals
for the Federal Circuit
SEP 03 2010

Jan Horbaly
Clerk

cc: Antonio M. Apodaca
Austin M. Fulk

APODACA V MSPB, 2009-3293
(MSPB – AT07523090223-I-1)

United States Court of Appeals for the Federal Circuit

2009-3293

Antonio M. Apodaca

Petitioner,

v.

Merit Systems Protection Board

Respondent.

JUDGMENT

ON APPEAL from the Merit System Protection Board

In CASE NO(S). AT0752090223-I-1

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED: JUN 10 2010

"s/"
Jan Horbaly, Clerk

ISSUED AS A MANDATE: SEP 10 2010

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

Antonio M. Apodaca
Appellant,

Docket Number
AT-0752-09 0223-I-1

v.

Department of Homeland
Security
Agency.

Antonio M. Apodaca, Miami, Florida, pro se.
Lt. Robert Pirone, Norfolk, Virginia, for the agency.

BEFORE
Garry Wade Klein
Administrative Judge

INITIAL DECISION

The hearing in this case took place at Miami, Florida on March 9, 2009. A decision was announced at the hearing and it is fully documented in the attached partial hearing transcript. The partial transcript contains the complete decision and related reasoning and legal references. The date of this transmittal document (not the date of the hearing) is the start date used to compute the finality date highlighted below in the appeal rights paragraphs.

DECISION

The appeal is DISMISSED.

FOR THE BOARD

"s/"
Garry Wade Klein
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

Antonio M. Apodaca,
Appellant

v.

Docket No:
AT-0752-09-0223-I-1

Department of
Homeland Security
Agency

_____/

BENCH DECISION

APPEARANCES:

FOR THE APPELLANT
ANTONIO M. APODACA
14221 SW 146 TERRACE
MIAMI, FLORIDA 33186-7209

FOR THE AGENCY:
Lt. ROBERT PIRONE
USCG MLCLANT (lg)
300 EAST MAIN STREET, SUITE 400
NORFOLK, VA 23510

P-R-O-C-E-E-D-I-N-G-S

2:10p.m.

ADMINISTRATIVE JUDGE: This will be a reading of a Bench Decision. The Bench Decision is not the final decision. Once we get the transcript from the court reporter, my office will issue another document which will actually submit the transcript of the Bench Decision to you. That copy will also contain all your Appeal Rights. Your Appeal Rights will not run until that document is issued. So the Bench Decision does not begin the appeal Rights right at this point.

Also, there will be no argument, objections or discussions during the reading of the Bench Decision or after it.

Do the parties understand that?

LT. PIRONE: Understood, Your Honor.

MR. APODACA: Yes.

BENCH DECISION

INTRODUCTION

ADMINISTRATIVE JUDGE: On December 30th, 2008, the Appellant filed his Board Appeal alleging his retirement on November 30th, 2008 was involuntary. The Appellant was granted a Jurisdictional Hearing, which was conducted on March 9th, 2009 in Miami, Florida. For the reasons stated below, the Appellant's Appeal is DISMISSED for lack of jurisdiction.

JURISDICTION

GENERAL LEGAL STANDARDS

The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. Maddox v. Merit Systems Protection Board, 759 F2d 9 at 10 (Fed. Cir. 1985). When a question is raised regarding the Board's jurisdiction, the employee filing the appeal has the burden of proof by a preponderance of the evidence. See 5 CFR Section 1201.56(a) (2) (2008). Preponderant evidence is defined to mean that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than not. See 5 CFR Section 1201.56(c) (2) (2004).

Generally, a resignation or retirement is presumed to be a voluntary act and, therefore, beyond the board's jurisdiction. See for example, Hurwitz v. Department of the Army, 61 MSPR 436 at 439 (1994); Gettings vs. Department of the Air Force, 48 MSPR 502 at 509 (1991). The presumption of voluntariness may be rebutted by evidence showing that the resignation or retirement was the result of duress, coercion or otherwise involuntary.

The mere fact that an employee is faced with unpleasant choices does not rebut the presumed voluntariness of the ultimate choice to retire. Locke v. US Postal Service, 61 MSPR 283 at 287 (1994); see in accord Schultz v. US Navy, 810 F2d 1133 at pages 1136-37 Fed. Cir. 1987). Rather, for a retirement in such circumstances to be considered involuntary and therefore appealable as a constructive removal, the Appellant must establish that the Agency did not have reasonable

grounds for is actions. Locke 61 MSPR at 288; see also Schultz 810 F2d at 1136. The appellant failed to do so.

The appellant was the Deputy Controller for the Integrated Support Command Miami Coast Guard. He held this position since approximately 2001 or 2002. In September of 2008, Anthony Alarid became the Comptroller of the Integrated Support Command in Miami and the Appellant's first Level Supervisor. Mr. Alarid testified that when he reported to the ISC Miami he reviewed the office layout and determined that he wanted his Deputy Comptroller to be in the office physically located next to him. He believed this to be a more professional environment and would increase communication between him and the Appellant, his Deputy. Mr. Alarid also believed it would place Ms. Lombardi in closer contact with her staff.

When Mr. first discussed with the Appellant in October, 2008 regarding switching the offices, the Appellant said he would retire before switching offices. Mr. Alarid then contacted the Human Resources Office regarding whether he could order Employee's to switch offices. Human Resources told him that it was his decision.

A week later Mr. Alarid notified the Appellant he had made his decision and the Appellant was to switch offices by December 1st, 2008. The Appellant responded he 'would retire' the day before the effective date of the office switch.

A series of conversations ensured between Mr. Alarid and the Appellant regarding the Appellant's statement he 'would retire'. The Appellant admitted that Mr. Alarid begged him not to retire and even offered to give up his office to the Appellant and Mr. Alarid would move to Ms. Lombardi's office. The appellant also testified that during these conversations he twice circle a date on his calendar in front of Mr. Alarid stating this was his retirement date. The second time he circled November 30th, 2008 as his date of retirement. The Appellant also testified he circled the last day he would be in the office, which was November 20th, 2008.

On November 20th, 2008 Mr. Alarid testified he saw the Appellant shredding and throwing out documents. He also saw the Appellant packing up his personal items. And, convinced that the Appellant was retiring and having received instructions from the Human Resources Office to get the Appellant was in the office. Mr. Alarid asked the Appellant for these items. He also told the Appellant he; "didn't have to go out like this", to which the Appellant responded; "No, I'm done".

Even though the Appellant admitted to circling the date for his retirement and circling the last day he would be in the office on the calendar, the Appellant testified he told Mr. Alarid he was only contemplating retirement. Mr. Alarid testified that the Appellant never said he was contemplating, instead he testified that the Appellant said that he intended to retire on November 30th. Mr. Alarid's testimony on this issue is credible. It is consistent with his Affidavit in the file. It is consistent with the e-mails at Tab G of the Agency file and is internally consistent.

Additionally, the appellant's cleaning out of his office, packing up his personal items and circling dates on the calendar are also consistent with Mr. Alarid's testimony.

I further find that Mr. Alarid's actions with regard to asking the Appellant for his SF-50 wee reasonable. Mr. Alarid wanted to get a replacement for the Appellant as quickly as possible and hopefully before the Appellant left. Human Resources had indicated it was best to have a Retirement SF-50 from the Appellant to do this.

Similarly, I find Mr. Alarid's actions with regard to collecting the Appellant's badge and keys on November 20th were reasonable, since this was the Appellant's last day in the office.

I find the Appellant's retirement was voluntary. I find that the Appellant did not have a reasonable belief that Mr. Alarid had terminated his employment on November 20th for the same reason that Mr. Alarid's actions were reasonable.

Additionally, if the Appellant actually believed he was terminated on November 20th he would not have submitted a Resignation SF-50 indicating he was retiring on November 30th. There would have been no reason to do so. The Appellant stated that he was mitigating his damages. If the Appellant had been constructively terminated on November 20th, he could not have then voluntarily moved his retirement to November 30th as he actually did.

In summary, I find that the Appellant has not proven by a preponderance of the evidence that his retirement was involuntary.

Finally, I note that the Appellant's allegations of prohibited discrimination are insufficient to establish Board jurisdiction in the absence of an otherwise appealable action. See Cruz v. Department of the Navy, 934 F2d 1240 at pages 1245 (Fed Cir. 1991) (en banc) (the Board has not granted jurisdiction over discrimination claims unaccompanied by an appealable action over which the Board has jurisdiction); Also see Wren v. Department of the Army, 2 MSPR1 at page 2 (1980) affirmed, 681 F2d 867 at pages 871-73 (D.C. Cir 1982) (5 United States Code 2302(b) is not an independent source of Board jurisdiction).

For the reasons stated above the appeal is DISMISSED for lack of jurisdiction.

The record is closed.

(Whereupon, the proceedings were concluded at 2:20p.m.

****

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

Antonio M. Apodaca Appellant, v.	Docket Number AT-0752-09 0223-I-1
Department of Homeland Security Agency.	Date: July 24, 2009

Antonio M. Apodaca, Miami, Florida, pro se.

Lt. Robert Pirone, Esquire, Norfolk, VA, for the agency.

BEFORE
Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we find that a question exists regarding the timeliness of the appellant's petition for review. We have not decided that issue because we conclude that there is no new, previously

unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
For the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991).*

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (7 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the

court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

"s/"
William D. Spencer
Clerk of the Board

Washington, D. C.

CERTIFICATE OF COMPLIANCE

No.

Antonio M. Apodaca,

Petitioner,

v.

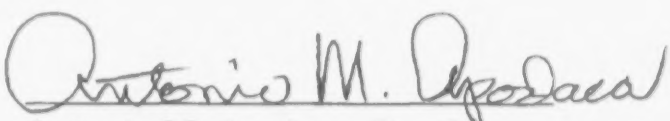
MERIT SYSTEMS PROTECTION BOARD,

Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 3208 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 01, 2010



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(305) 232-7024 (Home Phone)
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tapodaca@bellsouth.net

CERTIFICATE OF SERVICE

I, certify that I mailed the attached Petition for Writ of Certiorari this 02nd day of December 2010 to each of the following:

Merit Systems Protection Board

Jeffrey Gauger, Esquire
U. S. Merit Systems Protection Board
1615 M. Street, N.W.
Washington, D. C. 20419

Solicitor General of the United States

Solicitor General of the United States
Room 5614
U. S. Department of Justice,
950 Pennsylvania Ave., N. W.
Washington, D.C. 20530-0001

December 02, 2010
Date)

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